

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONNIE JACK

Claimant

VS.

CUSTOM CAMPERS, INC.

Respondent

Self-Insured

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Docket No. 225,189

ORDER

Respondent requested Appeals Board review of Administrative Law Judge Jon L. Frobish's June 12, 2001, Award of Review and Modification. The Appeals Board heard oral argument on December 18, 2001.

APPEARANCES

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, John I. O'Connor of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award of Review and Modification. At oral argument, the parties agreed the medical records admitted at the December 1, 1999, preliminary hearing are part of the record for determining the final award.

ISSUES

This Review and Modification Award is an award finalizing claimant's preliminary hearing request for post-award medical treatment and claimant's application for review and modification requesting an increase in claimant's permanent partial general disability.

The original award was entered by Administrative Law Judge (ALJ) John D. Clark in a Settlement Hearing held on March 11, 1998. Claimant injured his low back while working for the respondent on October 3, 1996. As a result of that injury, claimant was awarded \$4,521.22 of temporary total disability compensation representing 16.5 weeks and permanent partial general disability in the amount of \$7,327.08, representing approximately 6.5 percent permanent partial general disability based on functional impairment. The claimant's rights to future medical treatment and review and modification of the award were left open.

On November 1, 1999, claimant filed an Application for Preliminary Hearing requesting post-award medical treatment. A preliminary hearing was held on December 1, 1999, and the ALJ entered a preliminary hearing order dated December 2, 1999, that granted claimant's request for medical treatment. Respondent timely appealed the preliminary hearing order to the Board. In a February 11, 2000, Order, the Board affirmed the preliminary hearing order. Thereafter, on October 17, 2000, claimant filed an Application for Review and Modification requesting an increase in claimant's permanent partial general disability award.

The ALJ found claimant's need for medical treatment and his 5 percent increase in permanent partial general disability were the natural and probable consequence of claimant's original October 3, 1996, work-related low back injury. Accordingly, the ALJ granted claimant's post-award medical treatment requests and found claimant had an increase in permanent partial general disability of an additional 5 percent.

On appeal, respondent contends the greater weight of the credible evidence contained in the record proves that claimant's need for medical treatment and any increase in claimant's permanent disability was caused by a separate intervening accident claimant suffered at home on September 19, 1999. Thus, respondent argues it is not responsible for any workers compensation benefits resulting from this non-work related accident. The ALJ also found that claimant's attorney was entitled to \$1,375.00 in attorney fees for post-award services he performed in litigating claimant's request for medical treatment and his application for review and modification of the award. The respondent, in its brief before the Board, requested Board review of the post-award attorney fee issue. But, at oral argument, the respondent announced it was withdrawing its request for the Board to review that issue.

In contrast, claimant contends the record proves his worsening low back injury did not result from a separate intervening accident that occurred while claimant was at home on September 18, 1999. Claimant argues his worsening low back injury was the natural and probable consequence of his original October 3, 1996, work-related injury. Accordingly, claimant contends his need for surgery and the increase in his functional impairment are directly related to the original October 3, 1996, injury and are the responsibility of the respondent. Claimant also argues the worsening low back injury resulted in a 10.5 percent increase in permanent partial general disability instead of the 5 percent increase found by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and hearing the parties' arguments, the Board makes the following findings and conclusions:

For the reasons stated in the Award, the Board concludes the Award should be affirmed. The Board concludes that the ALJ's finding that claimant's worsening low back injury was a natural and probable consequence of the October 3, 1996, work-related back injury is supported by the record. In particular, the Board finds persuasive claimant's

testimony and also orthopedic surgeon Dr. Edward Prostic's testimony, who had the opportunity to examine the claimant both after his February 3, 1997, low back surgery following the October 3, 1996, accident and also after claimant's December 29, 1999, surgery following the worsening of claimant's low back injury that occurred on September 18, 1999.

The Board further finds it is not necessary to repeat the ALJ's detailed findings and conclusions in this order. The Board adopts those findings and conclusions as its own as if specifically set forth herein.

There is, however, one problem with the ALJ's calculation of the Award. In the ALJ's conclusions of law, the ALJ found the claimant filed his Application for Review and Modification on October 17, 2000.¹ The effective date of a change in functional impairment or work disability is the actual date the change occurred, except that in no event should the effective date of any such modification be more than six months before the date the application was filed.² Here, the claimant felt increased pain and discomfort in his low back while he was walking down the stairs at his home on September 18, 1999. Since claimant did not file the application until October 17, 2000, then the effective date of the change in claimant's disability would be April 17, 2000. The ALJ calculated the award using October 17, 2000, as the effective date of the disability change instead of April 17, 2000. But all of the increased weeks of permanent partial disability are currently due and owing, as of the date of this Order. Accordingly, in this case, it makes no difference whether the ALJ used October 17, 2000, or April 17, 2000, as the effective date of the modified award.

The Board otherwise agrees with the ALJ's method of calculation. Claimant is entitled to an award of permanent partial disability compensation based upon an 11.5 percent permanent partial general disability, less the amount of such compensation previously paid.³ The dissenting Board Members would apply a credit or offset to the compensation awarded, for weeks during which no compensation was paid. There is no such credit or offset provision in the Kansas Workers Compensation Act.

K.S.A. 44-528(a) (1993 Furse) provides in pertinent part that,

...if the administrative law judge finds ... that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such an award, or reinstate a prior award, upon such terms as may be

¹ The ALJ found the claimant signed the Application for Review and Modification October 16, 2000. But from the review of the administrative file, the Board finds the claimant filed the Application for Review and Modification on October 17, 2000.

² See K.S.A. 44-528(d) (1993 Furse).

³ See K.S.A.44-510e(a) (1993 Furse).

just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

Subsection (d) of K.S.A. 44-528 (1993 Furse) provides:

Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

In this case, the effective date of the modification award is April 17, 2000, which is six months before the application was filed. Payment of the modified permanent partial disability award commences on that date. The dissenting minority would push that date back to September 18, 1999, and deny claimant benefits for the period of September 18, 1999, through April 17, 2000. But there can be only one "effective date" and in this case that date is April 17, 2000. The effective date is the date the modification commences. Because the effective date of the modification award is the same date that the modified permanent partial general disability award commences to be paid out, claimant is entitled to the full number of additional weeks of permanent partial disability compensation beginning on that date and continuing until the award is fully paid or until further order of the director, whichever occurs first.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Jon J. Frobish's June 12, 2001, Award of Review and Modification should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority's opinion in regard to claimant's entitlement to 20.75 increased weeks of permanent partial general disability in this matter. While we agree with the majority's finding that claimant proved his functional impairment has increased by 5 percent, we disagree that claimant is entitled to the 20.75 increased weeks of permanent partial disability that the 5 percent increase represents.

We would find, as did the majority, that claimant's increased disability actually occurred on September 18, 1999. Claimant, however, failed to file an application for review and modification requesting the increase in disability until October 17, 2000. Thus, the effective date of the modified award is April 17, 2000, six months before the filing of the application instead of September 18, 1999, when the actual increase occurred.⁴ Between September 18, 1999, and April 17, 2000, there are 30.43 weeks. The claimant's 5 percent increase in permanent partial general disability represents only 20.75 weeks. We would find that claimant lost those 20.75 increased weeks in permanent partial disability because claimant failed to timely file his application for review and modification.

We have previously set out in detail the reason the party seeking a review and modification of an award will lose increased or diminished weeks of permanent partial general disability, if the party fails to timely file an application for review and modification within six months of the actual date the increase occurred. We find it is not necessary to repeat those reasons in this Dissent. Thus, we adopt the arguments and reasons set out in the Dissent in Ponder-Coppage v. State of Kansas, WCAB Docket No. 210,809 (January 2002) as if specifically set forth herein.

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
John I. O'Connor, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁴ See K.S.A. 44-528(d) (1993 Furse).

